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53268

EDMUND BELL, Administrator of the Estate of ANTHONY BELL, deceased, Plaintiff-Appellant, vs. BOARD OF EDUCATION, CITY OF CHICAGO, Defendant-Appellee.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Honorable David Canel, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court denying plaintiff's motion for a continuance on account of an absent witness and from further order of that court entering judgment for the defendant. The only point urged on appeal is that the trial court erred in denying plaintiff's motion for a continuance.

On May 22, 1968, this action for wrongful death was assigned for trial by the assignment judge and jury waivers were executed. When the case was called for trial on the afternoon of the above date, plaintiff moved for a continuance due to the absence of an occurrence witness. The motion was denied and plaintiff, directed to proceed with his case, refused to do so. Defendant was then directed to proceed. Defendant called one witness, who was not cross-examined by plaintiff, and rested. Thereafter judgment was entered for the defendant on the merits. Plaintiff did not attempt to obtain a dismissal without prejudice (Ill. Rev. Stat. Chapter 110, Section 52).

Practice with respect to applications for continuances motivated by the absence of material evidence is governed by Supreme Court Rule 231 which provides:

> (a) Absence of Material Evidence. If either party applies for a continuance of a cause on account of the absence of material evidence, the motion shall be supported by the affidavit of the party so applying or his authorized agent. The affidavit shall show (1) that due diligence has been used to obtain the evidence, or the

> want of time to obtain it; (2) of what particular fact or facts the evidence consists; (3) if the evidence consists of testimony of a witness, his place of residence, or if his place of residence is not known, that due diligence has been used to ascertain it; and (4) that if further time is given the evidence can be procured. (Emphasis supplied.)

The purposes of the affidavit are first, to establish that the necessity of delay is not the result of lack of diligence by the movant; second, to establish the materiality of the evidence; and third, to allow the other side to admit that the absent evidence pertains to certain facts as represented. (e.g. The opposite side could admit that a witness would testify to certain facts, if present. See Supreme Court Rule 231(b)).

The affidavit which accompanied plaintiff's motion for a continuance failed to set forth the facts to which the absent witness would testify, thereby eliminating (1) the possibility of the trial court's determining their materiality, a factor to be considered by the court in exercising its discretion when ruling on the motion, and (2) depriving the defendant of the opportunity to admit that the absent witness would testify to certain facts, were he present, and thus expedite a hearing on the merits.

In view of its purpose, we cannot agree that plaintiff's characterization of the witness in his affidavit as an occurrence witness was sufficient to satisfy the requirements of Rule 231 with respect to the affidavit in support of the motion. The inquiry is not directed to the question of whether a particular type of witness is properly heard in a given case, but whether, in the words of the Rule, the "particular fact or facts" to which the witness would testify are material, and whether the defendant, in the interest of proceeding to trial, will admit that the witness would testify to such facts.

We hold that the trial court did not abuse its discretion in denying plaintiff's motion in view of the defective

nature of the affidavit presented in support thereof. The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

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No. 68-100

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

A. D. 1969

LARRY A. BOWEN, Plaintiff-Appellee, vs. JACQUELINE A. BOWEN, Defendant-Appellant.	)))))))	Appeal from the Circuit Court of Will County, Illinois Honorable Angelo F. Pistilli Presiding

RYAN, J.

On June 25, 1968, Jacqueline A. Bowen filed a Complaint for Divorce in Fulton County, Illinois. Her husband, Larry A. Bowen, was served with summons in said case on July 3, 1968.

On June 27, 1968, after his wife had filed her Complaint for Divorce in Fulton County, but before he had been served with summons in said case, Larry A. Bowen filed a Complaint for Divorce against his wife in Will County, Illinois. She was served with summons on July 8, 1968.

On August 8, 1968 in the Will County case, the husband filed a petition to enjoin the wife from proceeding with her divorce action in Fulton County. The wife filed a cross-petition in the Will County case requesting the court to dismiss the same or in the alternative to transfer it to Fulton County. The Circuit Court of Will County denied the prayer of the wife's cross-petition and entered an order enjoining her from proceeding with her divorce action in Fulton County. It is from this order that the wife has appealed to this court.

Although counsel for the Appellee has entered an appearance in this court no brief or pleading of any nature has been filed on behalf of the Appellee. No opposition to the relief prayed by the Appellant has been presented to this court. Under these circumstances the Appellant's contentions concerning her right to the relief prayed in her cross-petition in Will County and the court's

error in enjoining her from proceeding with her divorce action in Fulton County are not contested. It is therefore not necessary for us to consider these questions on their merits. When an appeal is perfected and the Appellee does not submit an answering brief, the reviewing court may reverse the judgment without considering the merits of the appeal. Woodward v. Woodward, 96 Ill App2d 251, 238 NE2d 269; Roberson v. Morton, 94 Ill App2d 215, 237 NE2d 350; Klein v. Preist, 92 Ill App2d 74, 235 NE2d 870; Werbeck v. Werbeck, 70 Ill App2d 279, 217 NE2d 502. See also 2 Ill Law and Practice, Appeal and Error, Section 560.

The order of the Circuit Court of Will County is reversed and the cause is remanded to said court with directions to dismiss the Complaint for Divorce filed by Larry A. Bowen and to dissolve the injunction issued thereunder which enjoined Jacqueline A. Bowen from proceeding with her divorce action in Fulton County, Illinois.

Reversed and remanded with directions.

STOUDER, P.J., concurs.
ALLOY, J., concurs.

51217

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. WILLIE T. BENDER, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY ALFONSE F. WELLS, JUDGE PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Defendant, Willie T. Bender, was convicted after a bench trial of the crime of rape and was sentenced to the custody of the Illinois Youth Commission.

On appeal, the defendant contends that (1) he was not proven guilty beyond a reasonable doubt; (2) the trial court permitted the State to introduce prejudicial hearsay evidence; (3) the court unduly restricted the defendant in the presentation of his evidence; and (4) the defense counsel was wrongfully denied the right to examine the grand jury testimony of witnesses who testified at the trial for the State.

We note, from our Appellate Court files, that the record for appeal was filed in the Clerk's Office on March 11, 1966. The brief and argument for the appellant was filed on January 13, 1969, and the State's brief was filed on July 8, 1969. The reply brief was filed on September 29, 1969, the morning of oral argument.

The State's evidence on direct consisted of the testimony of Wanda Gray, a six year old girl, her mother, Marie Gray, the arresting officer, and a physician. On rebuttal, the State offered the testimony of the girl's father and mother. According to the testimony of the girl who was six, she was asleep on the evening of April 27, 1965, in the same bed with her twin sister and her two younger brothers when about 10:00 to 11:00 P. M. the defendant,

Willie Bender, who was residing with the Gray family, awakened her and told her to go downstairs. When they were downstairs, he took off her pajamas, told her to lie on the floor, then got on top of her, unzipped his pants and "put his front thing in me." She said he took his front thing out of the front zipper thing and put it between her legs in her front thing. She said he also put his mouth on her front part three times and then put his front thing into her again. She did not scream or cry out. He then told her that he was going to give her a quarter and to go back upstairs. She then went back to sleep. She said she told her twin sister what had happened. The sister told their older sister who in turn told their mother. Wanda then told both parents what had happened.

On cross-examination she testified that when the defendant took her downstairs her grandparents were asleep in the back room. She said she told her sister about the incident the next morning. After she told her sister, she talked to her father on the phone about the incident. Her father subsequently whipped her in front of the defendant and many members of her family to make her tell the truth. The girl testified that her father said that the defendant told stories about her, but he wanted the truth. She said she told the truth. She also said that she was mad at Willie because he hit her many times on the legs. The girl further testified that the defendant molested her on three different nights, but she forgot when he did it.

Marie Gray, Wanda's mother, testified that Willie had been staying with her family for about four months before the incident. He slept in the recreation room in the basement next to the room where her in-laws lived. On the Friday following the incident her oldest daughter, Cynthia, who was ten, told her what had happened. On Saturday, her husband beat Wanda with his belt

in the presence of the defendant, her children and herself to get the truth. The girl repeated the three acts of cunnilingus and her allegation that the defendant had put his thing into her. On the following Monday she took the child to a doctor who examined her.

On cross-examination, Mrs. Gray testified that she had known the defendant since he was a little boy. While living with her family he had, on occasion, been a baby-sitter for her children. On Friday, Mrs. Gray told the defendant that Wanda had told her sisters that the defendant had put his front thing into her. He denied it. After the doctor examined the girl on Monday, he told Mrs. Gray that someone had been messing around with the girl. Mrs. Gray then called the police.

Dr. Earl Frederick Jr., testified that on Monday, May 3, 1965, he examined Wanda Gray. He noted that the child had a profuse and foul vaginal discharge, that the hymenal ring was ruptured, and that there were small lacerations in the area of the hymenal ring. He concluded that there was a suggestion of gonorrheal infection. Dr. Frederick said that gonorrhea in a young child is not necessarily contracted by sexual contact, but that is a possibility. He presumed that the scratching of the hymenal ring occurred within the previous week because there were small lacerations at the time of the examination that had not completely healed. His opinion was based on the fact that in a young child healing occurs rather rapidly in the area of vascular genitalia. On cross-examination, Dr. Frederick stated that the rupture of the hymen could possibly have occurred months or even a year before his examination, but he reiterated that in his opinion it occurred more recently than that. After he examined the girl he told the mother that the child might have been molested and suggested that she call the police.

David Frazin, a police officer, testified that when he arrested the defendant on May 4, the defendant denied the rape charge. The defendant told the officer that he was awakened by Wanda sitting on his face. He said he pushed her off, scolded her, spanked her, and told her not to do it again.

Willie Bender then testified in his own defense. It was stipulated that he was sixteen years of age. He said that he resided with the Gray family about a month before the date of the alleged incident. He was employed five days a week. He said the girl's mother asked him on Friday if he knew anything about tampering with Wanda and he said he did not. On Saturday, the girl's father asked him if he had been tampering around with Wanda's private parts and he said he had not. The defendant said that he told the father, "you should know me better than that, as many times as I stay here and baby sit." The defendant testified that he had baby-sat with the children ever since he had been with the family. He stayed with them during the day until their mother came home from work. He related that the father asked the girl in his presence on Saturday to repeat what she had told him, and she replied, "he licked my pie." After asking her why she didn't say that before, the father whipped her to get her to tell the truth. The defendant testified that at first the girl said that the defendant did it, and then she said he did not. She said that the defendant had whipped her leg because she had jumped up by his head on the couch. When the father asked her why she had told the story about Willie she said that she was mad at him. The defendant testified further that about 10:00 P.M. on the Tuesday in question, Wanda came over to the couch where he was sleeping and jumped up on his head. The defendant said that Wanda's two younger brothers, Gaylord and Gary, were playing in the room at the time. He said he spanked Wanda on the leg and sent her upstairs. The defendant denied any impropriety with the girl.

In rebuttal, the State called Louis F. Gray, Jr., the father of the girl. He said that he struck Wanda with a belt on Saturday when the defendant and family members were present and at no time did the girl say anything about sitting on the defendant's head.

We shall first consider the defendant's contention that he was convicted on the uncorroborated testimony of a six year old girl who accused the defendant of rape only after the accusation was beaten out of her by her father and that such testimony did not prove defendant guilty beyond a reasonable doubt. We agree with the defendant that in rape cases appellate courts are especially charged with reviewing the evidence very carefully and it is the duty of the court to reverse where the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt and to create an abiding conviction that he is guilty of the offense charged. People v. Nunes, 30 Ill. 2d 143, 146, 195 N.E.2d 706, 707; People v. Faulisi, 25 Ill. 2d 457, 461, 185 N.E.2d 211, 213 People v. Sparling, 83 Ill. App. 2d 104, 107, 226 N.E.2d 54, 56. We are also in accord with the defendant's contention that this admonition takes on added weight when we consider the extremely young age of the six year old prosecutrix. The defendant refers us to People v. Brown, 86 Ill. App. 2d 163, at page 171, 229 N.E. 2d 922, at page 925. There the court said, "When a conviction in a rape case is dependent upon the testimony of the prosecutrix and the charge is denied, the testimony of the prosecutrix must be corroborated by evidence of other facts and circumstances. (People v. Reaves, 24 Ill. 2d 380, 183 N.E. 2d 169) unless her testimony is clear and convincing, in which case corroborative evidence is not required. People v. Mack, 25 Ill. 2d 416, 185 N. E.2d 154; People v. White, 26 Ill. 2d 199, 186 N.E.2d 351."

With these guidelines in mind we have carefully reviewed the evidence. The record reveals that a foundation was laid for the young witness which disclosed that she knew the difference between the truth and a lie and was intelligent and alert for her age. She could accurately recall and narrate the events of the night in question through an extensive cross-examination. The degree of intelligence of a child determines the question of a child' competency. People v. Davis, 10 Ill. 2d 430, 436, 140 N.E.2d 675, 680. The defendant argues that the evidence showed the girl made the accusation only after it was beaten out of her by her father. We do not agree. The girl told the same story to her sister and then to her mother before it was brought to her father's attention. The trial judge could find from the evidence that it was after this chain of events that the father confronted the defendant with the girl and beat her not for the purpose of compelling her to tell an untruth, but to make certain under parental force that she was telling the truth.

Dr. Frederick, the examining physician, corroborated the girl's version of the incident further when he testified that her hymen had been ruptured and he found small lacerations in the area of the hymenal ring that appeared to have happened recently. There was thus sufficient corroboration in addition to the unequivocal, clear and convincing manner in which the child testified, of the defendant's guilt beyond a reasonable doubt. It was for the trial court to weigh the testimony and to determine the credibility of the witnesses which was manifestly important in this case. The proof is not so unsatisfactory as to justify a reasonable doubt as to the defendant's guilt and to compel us to set aside the trial court's judgment. People v. Woods, 26 Ill. 2d 582, 585, 187 N. E. 2d 692, 693.

It is next contended that the trial court over objection permitted the State to repeatedly introduce into evidence prejudicial hearsay testimony. The complainant was allowed to relate that she had told her twin sister what had happened and that the sister told their older sister who in turn told their mother. The mother stated that the older daughter told her what had happened. This evidence was properly admitted not to show complaint by the injured party, People v. Smith, 55 Ill. App. 2d 480, 204 N.E. 2d 577, but to show the chain of events that took place before the father confronted the defendant with the daughter's accusation. It also demonstrated that the girl did not first tell her version of the events only after being beaten by her father.Since the evidence was not offered to show the truth of the charge against the defendant, it was not hearsay and was properly admitted.

We turn next to the contention that the court unduly restricted defense counsel in his cross-examination and in his presentation of the evidence. It is first argued that defense counsel was restricted from cross-examining Louis Gray, the girl's father, who was called as a rebuttal witness. The substance of Mr. Gray's testimony was,that after being struck by him, his daughter did not retract her story or say that she sat on the defendant's head. This was in refutation of defendant's version of her statements at that incident. As a rule cross-examination is limited to the scope of direct examination. People v. Kirkwood, 17 Ill. 2d 23, 30, 160 N.E. 2d 766, 771. We think defense counsel was allowed great latitude in his cross-examination. We cannot say from the record that the trial judge abused his discretion in this matter, particularly when defense counsel persisted in going into matters not gone into on direct. People v. Du Long, 33 Ill. 2d 140, 210 N.E.2d 513. Defense counsel could have called Mr. Gray as his witness or have requested that Mr. Gray be called as a hostile witness, but neither request was made. The matter of the confusion of this witness as to the day he whipped his daughter was not important to the issue of

guilt, particularly since the defendant also testified that the incident took place and the parties were in accord as to who was present at that time.

Defense counsel called Edward Garon, a clerk of the County Jail who was custodian of the jail records, as his witness. He attempted to elicit from Mr. Garon the information that the jail records did not reflect any evidence of the defendant having venereal disease. An objection to this inquiry was sustained. It appears that a Dr. Urba had examined the defendant, and a continuance was requested to bring him in. This request was denied. It is argued that a continuance should have been granted even though the trial was in progress and that the failure to grant it unduly restricted the defense. This evidence was apparently sought because Dr. Frederick had testified that the girl had a suggestion of gonorrheal infection. No mention was made before the trial commenced that Dr. Urba was not available as a witness nor was any request made of the prosecutor to stipulate as to what the jail record showed or to what Dr. Urba would have testified. We must note that after counsel was not allowed to question Mr. Garon on this matter the defendant took the stand. Defense counsel did not inquire of him whether he had or ever had venereal disease or whether a physical examination was given him while he was incarcerated. The matter of a continuance is within the sound discretion of the trial judge and it is only where the record shows an abuse of such discretion that the conviction will be reversed. People v. Harper, 31 Ill. 2d 51, 57, 198 N.E. 2d 825, 829. We find no abuse of discretion in denying this request for a continuance.

Finally, it is contended that the court erred in not permitting defense counsel to examine the Grand Jury minutes of the testimony of the prosecutrix. Defense counsel did not request the Grand Jury minutes during his cross-examination of the complaining witness who was the first witness at the trial. Nor did

he request permission to recall this witness for further cross-examination. It was only after the State rested its case that defense counsel asked for these minutes for impeachment purposes, and at that time no request was made to recall the witness for cross-examination. Defense counsel did cross-examine Mrs. Gray with the aid of the Grand Jury minutes of her testimony. To obtain the Grand Jury minutes, it must be shown that they are for the purposes of impeachment. No such foundation was laid here as it was in People v. Johnson, 31 Ill. 2d 602, 203 N.E.2d 399. Under the circumstances in this case, we cannot say the trial judge erred in denying the request for the minutes thus requiring a new trial.

Since we find no reversible error in this cause, the judgment of the Circuit Court is affirmed.

AFFIRMED.

ADESKO, P. J., and MURPHY, J.

CONCUR.

(Abstract only)

53137

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALFRED MONROE, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY. Honorable Francis T. Delaney, Presiding.

MR. PRESIDING JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a conviction, after a bench trial, of the offense of rape. Judgment was entered and the defendant was sentenced to a term of two to six years. Defendant's sole contention on appeal is that he was not proven guilty beyond a reasonable doubt.

Testimony of Merline Motley, complaining witness:

She now resides at 3830 West Adams. On Sunday, March 19, 1967, the date of the alleged attack upon her, her address was 146 South Hamlin. She lives with her husband and five children. She works at Science Research, inspecting and cleaning children's books before they are shipped to different schools. At 6:00 A.M. on March 19, 1967, she bought some cigarettes at a nearby gas station and started to walk back home. The defendant approached her from the opposite direction and asked where she was going. She stated she was going to meet her husband and kept on walking. As she approached her hallway, the defendant took her and pushed her up toward the hall wall inside her building on the first floor. The defendant tried to have sexual relations with her standing up but failed. He then took her up to the second floor landing, pushed her down on the floor and had intercourse with her.

Defendant said, "I can't get it like I want to," and took her back down to the first floor landing. He took off his leather coat and laid it down on the floor and said, "Bitch, get

down here." She said it was daytime outside and suggested they go to a hotel right around the corner. As defendant bent down to pick up his coat she broke away and ran out screaming. She had not screamed prior to this time because he had told her he had a .38 revolver in his pocket and that if she didn't come near him he would blow her brains out. She didn't try to run to her apartment because she was afraid he would hurt her children.

As she ran out of the building screaming, she saw a police officer in a squad car. The officer jumped out of the car and asked what was wrong. She said she had been raped. She saw the defendant running out of the building as the officer called for assistance. The officer chased defendant as she remained in the police car. She had never seen nor did she know defendant before he attacked her.

On cross-examination she stated that the building in which she lives has six apartments, two on each floor, which are all occupied. The first and second floor lights were on in the halls. It was "kind of" light outside at this hour. No buses stopped in front of her building nor were there any people waiting for a bus as she walked home after buying the cigarettes.

She had on a red plaid coat which had four or five buttons, a skirt, a pullover blouse and a shirt nightgown. She wore no undergarments for she couldn't stand anything to touch her stomach as she had an infection in her tubes.

She had no fear of defendant until he got in front of her on the street. She did not know if the light on the second floor was on since she did not know when they went off in the morning.

She works five or six days a week, waking up about 5:00 A.M. She never works on Sunday and does not know if anyone

else in the building works on Sunday.

When defendant attempted to have relations with her standing up in the hall, he pulled up her clothes and unzipped his pants and then tried to get his private in her. He had his hands on her but she did not know where. She got to the second floor landing by defendant pulling her by the coat. He pushed her down on the floor which made a noise which was "loud enough." He was on top of her and put his private into her body. She did not scream because defendant had told her he had a .38 revolver. She never saw nor felt any gun on his person.

She did not know defendant before March 19, 1967. She never had sexual relations with him at his place of employment and never demanded that he pay $10 to her. She had never seen him before.

A strap on her gown was torn but nothing else. Her coat was dirty in the back after the attack upon her and she had it cleaned.

She went to the hospital after the attack upon her and was examined. The doctor looked at the lower part of her body and gave her some pills for her nerves.

She did not scream in "her apartment" but was screaming and running out the door of her building after she broke away from the defendant.

Sergeant Thomas Donohue, called by the State:

He is a police officer with the Chicago Police Department. On March 19, 1967, he was assigned to the 11th District which encompasses complaining witness' apartment at 146 South Hamlin. At approximately 6:00 A.M., in the vicinity of Adams and Hamlin, he observed the complaining witness screaming and running down the street. He stopped his squad car as she ran up to him screaming that a man had raped her. As she talked to him she

pointed down the street. He looked down the block and observed a male Negro, now identified as the defendant, standing in front of 146 South Hamlin putting on his coat. The defendant looked towards him. He was in uniform and was standing next to his marked squad car. He radioed for help as the defendant ran into the hallway at 152 South Hamlin. When assistance arrived he proceeded to go to 152 Hamlin and identified himself and yelled for defendant to come down. Defendant came down and was arrested and searched, but no gun was found. When he first saw the complaining witness she was crying and was hysterical. She was not angry. She had on a red coat, the back of which was dirty.

He never saw the defendant nor the complaining witness before March 19, 1967. He could not recall if the lights were on in the halls at 146 South Hamlin when he inspected the rape scene. The light from outside illuminated the floors. There is very little traffic out on Sunday at 6:00 A.M. but he could not recall if there had been other vehicles on the street.

Testimony of Alfred Monroe, defendant:

He lives at 3333 West Grenshaw. He is a janitor and has been employed as such since April 1966. He was in the vicinity of 146 South Hamlin at approximately 6:00 A.M. When he first saw the complaining witness he did not recognize her but when he got closer to her she called him by his first name. They stopped in front of 146 South Hamlin. She started talking to him and asked about the $10 he owed her. He said he owed her $8.

He had intercourse with her twice before in June or July of 1966. He paid her $12 the first time but the second time he got it on credit by paying her $2 on account. When she came to collect her money the next Saturday at a pool hall, he "ducked her" by telling his partner to get rid of her.

When she asked for her money on March 19, 1967, some eight months later, he tried to "fast talk" her. He then saw a police car coming down the street and she ran toward the car and stopped it. She did not scream. The officer pulled his gun and he was arrested in front of the building. He did not run into the building at 152 South Hamlin.

He did not have sexual relations with the complaining witness because he had gonorrhea. He never touched her in any way.

He has five or six girl friends but he does not owe any of them any money. He had not seen the complaining witness since June or July, 1966. He is living with a woman other than his wife, from whom he is separated. He also keepsseveral other women.

On rebuttal the State introduced defendant's conviction for burglary entered on February 25, 1966.

Opinion

The defendant contends that he was not proven guilty beyond a reasonable doubt because the testimony of the complaining witness was not clear and convincing and lacked adequate corroboration.

Our Supreme Court has held that corroboration of a complaining witness' testimony is not necessary where it is clear and convincing. People v. White, 26 Ill. 2d 199; People v. Szybeko, 24 Ill. 2d 335; and People v. Walden, 19 Ill. 2d 602. We believe that the testimony of the complaining witness is sufficiently clear and convincing to sustain defendant's conviction. The complaining witness offered a reasonable explanation for her errand and her dress; the testimony of her encounter with the defendant was positive and unshaken; her repeated denials of either having prior sexual relations with

the defendant or ever knowing him before were not impeached; and she made an immediate complaint to the police.

Defendant also argues that the State failed to introduce any medical proof of the rape to corroborate the complaining witness' testimony. In People v. Edmunds, 30 Ill. 2d 538, 542, the court said:

> The People are not required to produce such medical testimony when sufficient other corroboration of the forcible intercourse is presented. People v. Fort, 14 Ill. 2d 491; People v. Hill, 28 Ill. 2d 438.

In the instant case the complaining witness ran screaming from the building in which the rape occurred after her escape from the defendant and made an immediate complaint to the first person she saw. In People v. Thompson, 91 Ill. App. 2d 34, 41, the court said that:

> Immediate complaint has been held corroborative of the victim's testimony. People v. Jenkins, 24 Ill. 2d 208, 181 NE2d 79; People v. Finley, 22 Ill. 2d 525, 177 NE2d 149.

Further corroboration is found in the arresting officer's testimony as to complaining witness' hysteria when she first ran up to his squad car, the dirty condition of the back of her coat, and defendant's flight.

Defendant's testimony that he was just talking to the complaining witness in front of 146 South Hamlin when she ran to the squad car and that he was arrested at the scene was contradicted by both the complaining witness and the arresting officer.

In People v. Smith, 27 Ill. 2d 344, 349, the court stated:

> Where a case is heard by the trial court without a jury, the determination of the credibility of the witnesses and the weight to be accorded their testimony is for the judge to decide, and, unless the evidence can be said to be clearly insufficient, a reviewing court will not substitute its

> judgment for that of the trier of fact who observed the witnesses, heard them testify and was in a far better position than are we to determine where the truth lay. (People v. West, 15 Ill. 2d 171; People v. Reaves, 24 Ill. 2d 380.)

The judgment is affirmed.

AFFIRMED.

English and Leighton, JJ., concur.

Publish abstract only.

52441

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRED C. BROWN, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Hon. Irwin N. Cohen, Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial defendant was found guilty of the offenses of indecent liberties with a child and of aggravated battery. On each conviction he was sentenced to the penitentiary for a term of two to four years, to be served concurrently. On appeal defendant contends that the trial court erred in accepting his jury waiver because it was not understandingly made by him in open court, as provided by statute.

At the trial defendant was represented by counsel of his own choice, Charles E. Tannen. The report of proceedings shows that when the case was called for trial the following took place:

THE CLERK: Fred Brown.

MR. LYNCH: The State is ready for trial, your Honor.

MR. TANNEN: The defendant, Fred Brown, is ready for trial, your Honor. He has indicated that he wishes to be tried by the Bench rather than by a jury.

THE COURT: Mr. Brown, you have a right to a trial by jury. You may, however, if you wish, waive that right to a trial by jury and submit this case to the Court.

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to waive a jury trial?

THE DEFENDANT: Yes.

MR. TANNEN: Let the record show that he is executing a jury waiver, a signed jury waiver, your Honor, which I will file with the clerk.

Defendant contends that he was not adequately apprised of his right to a jury trial, with the result that he did not understandingly waive such right. He asserts the trial court is

charged with the duty to see that the election of an accused to forego a trial by jury is expressly and understandingly made, and that duty cannot be perfunctorily discharged. People v. Surgeon, 15 Ill.2d 236, 238, 154 N.E.2d 253 (1958).

Defendant argues that the foregoing questions and answers do not meet the requirements of the statute or the decisions on jury trial waivers because "there was no explanation whatsoever of the meaning and significance of a trial by jury. There was no explanation that at a bench trial the court could sentence the defendant for a term of years in the penitentiary for the number of years specified by the Criminal Code. No evidence appears that the defendant understood his rights. The only statement made was that he was advised that he had a right to a jury trial. This statement does not prove that he knew what a jury trial meant or what a bench trial meant. Nor does this statement constitute an explanation of the functions of a jury trial. There is no evidence that his counsel explained the significance of a jury or a bench trial. The statements of the court do not constitute an explanation of the defendant's rights and cannot be considered as statements or advice which prove that the waiver by the defendant of a jury trial was understandingly made."

Defendant's authorities include People v. Turner, 80 Ill. App.2d 146, 225 N.E.2d 65 (1967), and People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708 (1964). In People v. Turner, it is said (p. 150):

> " * * * the trial judge did not ask defendant whether he then knew of his right to a jury trial. Under all of the circumstances of this case we find that the right to a jury trial was not understandingly waived by defendant in open court. * * * Under the circumstances of this case, after the conference between defendant and his counsel the trial judge should again have inquired of defendant whether he knew what a jury trial was and whether he wished to be tried by a jury."

In People v. Wesley, it is said (p. 133):

> "Equally well settled is the principle that it is the duty of the trial court to see that the election to forego a jury trial is expressly and understandingly made by the accused. * * * There is no specific or

> defined formula which the trier of fact is to follow, or from which to judge whether a waiver is understandingly made, and we believe of necessity that the determination must rest upon the facts of each particular case."

We think the remarks made by the Illinois Supreme Court in People v. Richardson, 32 Ill.2d 497, 499, 207 N.E.2d 453 (1965), apply here:

> "Whether a jury waiver has been knowingly and understandingly made depends upon the facts and circumstances of each case, and there can be no precise formula for determining whether a waiver is understandingly made. * * * Merely because the court did not at length discuss the consequences of the jury waiver does not necessarily require a holding that the waiver was not understandingly made. * * * While the trial court might well have dwelt at more length on this matter in complying with its duty to insure that the jury waiver was expressly and understandingly made * * *, we believe that this record indicates that defendant understandingly waived his right to trial by jury."

We agree that the trial court has the duty to see that an accused person's election to waive a jury is not only expressly but also is understandingly made by defendant in open court, and the performance of that duty cannot be perfunctorily discharged. Here the colloquy between the court, defendant's counsel and defendant affirmatively indicates that defendant knew he had a right to a jury trial, and that his jury waiver was expressly and understandingly made. Also, the trial court was entitled to rely on the professional responsibility of defendant's attorney that when he tendered to the court defendant's jury waiver, which had been executed in open court, that it was expressly and understandingly executed by his client. "Defendant is not permitted to complain of an alleged error which was invited by his behavior and that of his attorney." People v. Melero, 99 Ill. App.2d 208, 211, 240 N.E.2d 756 (1968); People v. Novotny, 41 Ill.2d 401, 244 N.E.2d 182 (1968).

In the instant case, even though the result of defendant's jury waiver may now be unsatisfactory to defendant, we find that it was not error for the trial court to have accepted and acted upon it.

For the reasons given, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

53162)
) Consolidated
53354)

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PHILLIP W. REED (Impleaded), Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Hon. Richard J. Fitzgerald, Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant, represented by the Public Defender, pleaded guilty to the offense of robbery. After hearing testimony stipulated to by agreement between the prosecutor, defendant and his counsel, the court found defendant guilty and sentenced him to the penitentiary for one to three years.

On May 23, 1969, the Public Defender, counsel for defendant on appeal, filed in this court a petition for leave to withdraw as appellate counsel pursuant to the rule in Anders v. California, 386 U.S. 738 (1967), and filed a brief in support of his petition, which alleged the appeal was without merit and could not possibly be successful.

On September 18, 1969, defendant was notified by this court that the Public Defender's motion to withdraw as counsel for defendant had been allowed on May 29, 1969. Defendant was sent copies of the petition and the brief in support thereof and was instructed that he had until November 18, 1969, to file any points he might choose in support of his appeal. Defendant has failed to file any such points.

The brief and argument state that the only basis for an appeal rests upon a failure to fully admonish defendant as to the significance and consequences of a change of plea to guilty. When the case came up for trial on January 11, 1968, the following colloquy took place:

MR. HIMEL: Thank you, your honor. In view of this, I have had a conference with my client this morning and he informs me that at this time it is his desire to withdraw his plea of not guilty heretofore entered and to enter a plea of guilty to indictment 67-3082 charging him with robbery.

THE COURT: Mr. Reed, your counsel advises me you wish to withdraw your plea of not guilty and enter a plea of guilty to this indictment, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Before you enter your plea you must realize that by entering a plea of guilty to this indictment you automatically waive any right you might have to a trial by jury, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Before accepting your plea of guilty to this indictment, which charges you with robbery, the court must advise you that on your plea of guilty you may be sentenced to the State Penitentiary for a period of not less than one nor more than 20 years. Knowing that do you still persist in your plea?

THE DEFENDANT: Yes, sir.

THE COURT: Let the record show the defendant has been advised of the consequences of his plea of guilty to this indictment, which charges him with robbery, and after having been so advised the defendant persists in his plea.

The point raised in defense counsel's brief is governed by the following:

Chapter 38, § 115-2 of the Criminal Code (Ill. Rev. Stat. 1967):

> (a) Before or during trial a plea of guilty may be accepted when:
>
> (1) The defendant enters a plea of guilty in the court;
>
> (2) The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

Supreme Court Rule 401(b) provides:

> (b) Procedure on Plea or Waiver. The court shall not permit a plea of guilty or waiver of indictment or of counsel by any person accused of a crime for which, upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court at the time waiver is sought to be made or plea of guilty entered, or both, as the case may be, that the accused * * * understands the nature of the charge against him, and the consequences thereof

> if found guilty * * *. The inquiries of the court, and the answers of the accused to determine whether he understands his rights * * * and comprehends the nature of the crime with which he is charged and the punishment thereof fixed by law, shall be taken and transcribed and filed in the case. The transcript, when filed, becomes a part of the common law record in the case.

We agree with the Public Defender that the record establishes that the court's admonition to defendant was adequate and did adhere to the requirements of Supreme Court Rule 401(b) as construed by the Supreme Court in People v. Ballheimer, 37 Ill.2d 24, 26, 224 N.E.2d 811 (1967), and People v. Kontopoulos, 26 Ill.2d 388, 390, 186 N.E.2d 312 (1962).

We have examined at length the Public Defender's brief in support of his motion to withdraw and have reviewed all of the proceedings in accordance with the requirements of Anders. We conclude the appeal is without merit, and the judgment of conviction is hereby affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

117 I.A. 2nd 388

53212

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERNEST BENJAMIN, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Hon. Reginald J. Holzer, Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial defendant pleaded guilty to the offense of unlawful possession of a narcotic drug (marijuana) and was admitted to probation for a period of three years. Defendant appeals from an order which revoked his probation and sentenced him to the penitentiary for a term of two to four years. On appeal defendant contends that the "penitentiary sentence was severe and the facts and circumstances warrant that probation would best effect rehabilitation."

On December 21, 1966, pursuant to a plea of guilty, a stipulation of facts was entered into, which showed that on November 15, 1966, at 5:00 P.M., Police Officer Armstrong was called to a teen-age disturbance at 63rd and Drexel Avenue, Chicago. When he arrived at the scene and left his car, he observed a group of teen-agers, including defendant, Ernest Benjamin. He saw defendant drop a small brown envelope to the street, and he picked it up and found that it contained a crushed green plant. Defendant was then arrested. The plant was submitted to the crime laboratory and identified as marijuana in the amount of 1.7 grams, sufficient for about five cigarettes.

At a hearing on aggravation and mitigation, it was shown that defendant had been under court supervision for the same offense. He was nineteen years old and had no misdemeanor or

felony record. He made an application for probation and stated that he intended to reside with his older brother in Chicago, where he had lived on previous occasions. On December 21, 1966, after reviewing the facts and urging defendant at length to mend his ways, Trial Judge Reginald J. Holzer admitted defendant to probation.

On February 14, 1968, defendant appeared before Judge Holzer on a rule to show cause on violation of probation. It was not disputed that defendant had left this jurisdiction without permission and had gone to Florida to visit a sister, where he remained for about four and one-half months. Defendant said he was not told that he was not supposed to leave the city, but admitted that he knew he had to report once a month to the probation officer, and he knew that he was violating his probation by failing to report when he went to Florida.

At the hearing defendant's sister, Lily James, testified that if defendant were released he would live with a brother, James Benjamin, who had a room for him, and a cousin who had a laundromat business would give him a place to work. As to Florida, she said that the defendant "wanted to go away from the company that was the cause of him getting in trouble. He said he was afraid he would be mixed up with bad company. And he said he wanted to go to my sister's in Florida a while. I said, 'Ernest, you should talk with the people about going.' He said he was afraid to come, they may not let him go or something. And he called me and he went to live with my sister down there. He did work all the while he was there. He worked on a landscaping job. But he wanted to come back home, and he came back, and that is when he was picked up."

Another witness, Connie Benjamin, married to defendant's older brother, said, "I am offering him a home at such time when he is released. He would live at 6808 S. Aberdeen. I have known him about thirteen years. Yes, we are willing to offer him a home

and we got him a job at 27 East 18th Street. That job is with Peter Park who has a laundromat. He has definitely agreed to hire Ernest. Ernest has lived with me before. He lived with me about three years once, then a year. After he got involved he came and lived with me. Yes, he was living with me when he was on probation. He has never given me any trouble when he was living with me."

In response to the court's question as to why defendant went to Florida, she said, "One of the sisters was ill. We all went down. I went down there and my husband did also, because she was ill, and then we came back. Actually, your Honor, there are gangs up here. They are terrible. If you don't participate with them they will kill you. I have a son; they threatened to shoot him."

Defendant contends that the circumstances of this offense and the defendant's background reflect that this defendant is not incorrigible, and probation is more likely to result in rehabilitation than is a term in the penitentiary. Defendant argues at length that he should be given a second chance, and that he be placed on probation and allowed to continue his efforts to rehabilitate himself. Defendant's authorities include a number of Illinois cases in which the Appellate Court of Illinois reduced sentences for violation of probation, such as People v. Carroll, 76 Ill. App.2d 9, 16, 221 N.E.2d 528 (1966), where the sentence was reduced because the displeasure of the trial court was a factor in the imposition of the sentence. Also, People v. White, 93 Ill. App.2d 283, 235 N.E.2d 393 (1968), where the minimum sentence was reduced. There the pronouncements of the court included (p. 288):

> "Where, as here, however, we find that in the sentencing process there was a commingling of matters relating to the original offense with the conduct allegedly constituting the violation of probation, as well as reference to nonrecord terms and conditions of probation, we feel compelled to scrutinize the sentence."

The State contends that the sentence given the defendant was proper and within the discretion of the trial court and should

be affirmed. The State argues that defendant knowingly left this state to go to Florida in violation of his probation and was there for four and one-half months and never made contact with the probation officials. Also, the defendant had been warned of the seriousness of his offense when he was placed on probation, and the sentence given the defendant was in the discretion of the court. The State further argues that it is only under rare and unusual circumstances that a reviewing court will interfere with the discretion of the trial judge in the imposition of sentence. Citations include People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673 (1965), where it is said (p. 424):

> "We believe that under the now applicable statute granting reviewing courts the power to reduce sentences imposed by trial courts where circumstances warrant (Ill. Rev. Stat. 1963, chap. 38, par. 121-9(b)(4)), such authority should be applied with considerable caution and circumspection, for the trial judge ordinarily has a superior opportunity in the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed than do the appellate tribunals."

The remarks of the court made at defendant's revocation and sentencing proceedings indicate that although the court was concerned over defendant's violation of probation, displeasure was not a factor in the imposition of sentence. The trial court was impressed with defendant's family and remarked, "You come from a nice family, Mr. Benjamin. Your sisters and sister-in-law seem to be very decent people and they love you very dearly."

After examining this record we conclude that this is not a proper case for the readmission of defendant to probation or for the exercise of the statutory power to "reduce the punishment imposed by the trial court." The trial court properly revoked defendant's probation. We are not persuaded that the sentence is excessive. Defendant, with "time credit for good behavior," has just about served the minimum term of his indeterminate sentence, and if his behavior in the penitentiary warrants it

the Parole and Pardon Board within the Department of Public Safety has the statutory power to parole defendant at this time.

For the reasons given, the order of court which revoked defendant's probation and sentenced him to the penitentiary for a term of two to four years is affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CHESTER SINGLETARY, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HON. FRANCIS T. DELANEY, JUDGE PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, Chester H. Singletary, was charged by indictment with the offenses of attempt murder and aggravated battery. After a number of continuances he entered a plea of guilty. After hearing testimony stipulated between the prosecutor, the defendant and his counsel, he was found guilty on both charges and sentenced to a term of five to twenty years for attempt murder and five to ten years for aggravated battery in the Illinois State Penitentiary, the sentences to run concurrently. Then on June 7, 1968, the finding and the sentencing on the charge of aggravated battery was vacated. The defendant filed a notice of appeal and the Public Defender was appointed to represent him. On March 26, 1969, the Public Defender filed a motion, after serving the defendant with a copy, for leave to withdraw from the case as counsel for the defendant on the ground that the record revealed no appealable grounds for reversal. In support thereof and pursuant to the ruling in the case of Anders v. California, 386 U.S. 738, he attached a brief in which he concluded from a review of the transcript of the common law record and the report of the proceedings that the only basis for an appeal would be:

(1) That the court did not admonish the defendant as to the significance and consequences of his change of plea from not guilty to guilty.

(2) That the trial court committed prejudicial error in denying defendant's motion to suppress.

The public defender set forth the colloquy proceedings that took place before the plea of guilty was accepted. He stated that the record disclosed that the trial judge discussed with the defendant the significance of the plea of guilty, and advised the defendant of the consequences of a guilty finding to the charge of attempt murder. He concluded that the court did adhere to the requirements of Chapter 38 Section 115-2 Supreme Court rule 401(b) and the requirements set forth in People v. Kontopoulis, 26 Ill. 2d 388, and we agree.

On the motion to suppress oral statements of the defendant, the Public Defender points out that the court heard six witnesses and argument of counsel. He points out that by his plea of guilty, the defendant is deprived of questioning the legal sufficiency of the evidence against him as in this motion to suppress. People v. Green, 17 Ill. 2d 35.

For the foregoing reasons the Public Defender found no appealable errors and we allowed his request to withdraw as attorney for the defendant on April 22, 1969. On the same date, we appointed Daniel M. Schuyler, Jr. of the firm of Schuyler, Stough & Morris to represent the defendant on appeal and he filed an appearance. On August 7, 1969, he filed a motion for leave to withdraw on the ground that a review of the trial record of the Public Defender's motion and brief indicated that further legal

representation of the defendant in this cause would be of no benefit to him since nothing more can be added to the efforts of the Public Defender.

On September 8, 1969, defendant was notified by this court of the motion of Daniel Schuyler to withdraw and was sent a copy of said motion and he was instructed that he had until November 10, 1969, to file any points he might choose in support of his appeal. We informed him that after such date we would make a full examination of all proceedings and decide whether the appeal is wholly frivolous and if we so find we may grant counsel's request to withdraw and affirm the judgment without further appointment of counsel.

On November 7th, 1969, the defendant pro se filed a motion in which he stated that the Public Defender has filed a motion to withdraw and requested that we should appoint a private counsel in his place, citing Douglas v. California, 372 U.S. 353, 83 S.Ct. 814.9 L.Ed 2d 811, (1963). In that case the Court, on its own motion, found the indigent defendant's appeal to be frivolous and refused to appoint any counsel. We, on the other hand, allowed the Public Defender to withdraw and appointed a private counsel to represent the defendant. We are now confronted with a motion to withdraw by his new counsel. As noted here, we have, in fact, complied with the defendant's request and apparently he is confused. The defendant has failed to file any additional points for appeal.

We have thoroughly considered the Public Defender's brief in support of the motion made by Daniel Schuyler to withdraw and have made a full examination of all the proceedings in accordance with the requirements of Anders v. California, 386 U.S.738. We have

concluded that there is no merit to this appeal.

The defendant's counsel Daniel M. Schuyler, Jr. is granted leave to withdraw and the judgment of conviction is affirmed.

JUDGMENT AFFIRMED.

ADESKO, P. J. AND MURPHY,

J. CONCUR.

(Abstract only)

117 I.A. 2nd 410

53957

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CHARLES JORDAN, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Philip Romiti, Presiding.

MR. PRESIDING JUSTICE ADESKO DELIVERED THE OPINION OF THE COURT:

Defendant, Charles Jordan, was charged with the crime of burglary. He entered a plea of not guilty and the Public Defender was appointed as his counsel. On December 20,1968, the defendant informed the court that he wished to change his plea. The trial judge questioned the defendant regarding his change of plea to guilty, pursuant to Chapter 38, Sec. 115-2 Illinois Revised Statutes (1967). The judge informed him of the consequences of entering a plea of guilty, such as the penalties that could be imposed and the waiver of his right to a trial by jury. The defendant indicated that he understood and persisted in his plea of guilty. The court then entered judgment on the plea after hearing testimony in aggravation and mitigation, sentenced defendant to serve a term of two to four years in the penitentiary. Defendant filed a notice of appeal and the Public Defender was appointed to represent him.

After the record on appeal was filed, the Public Defender filed a motion for leave to withdraw from the case on the ground that a careful examination of the record lead to the conclusion that an appeal would be without merit and could not possibly be successful. The Public Defender filed a brief

in support of his motion in which he concluded that from an examination of the record, the only possible error which could be urged would be the trial court's admonishment to the defendant after defendant informed the court of his wish to enter a plea of guilty. The record establishes beyond question that the court's admonishment was more than adequate and that an appeal on that point would be unworthy of serious consideration. Supreme Court Rule 401 (b), Ch. 110A, Sec. 401 (b), Ill. Rev. Stat. (1967); People v. Kontopoulis, 26 Ill. 2d 388, 186 N.E. 2d 312 (1962).

On September 8, 1969, defendant was notified by this court of the Public Defender's motion to withdraw; was sent copies of that petition and the brief in support thereof; and was given time until November 10,1969, to file any points he might choose in support of his appeal. The defendant has failed to file any such points.

We have thoroughly considered the Public Defender's brief in support of his motion to withdraw and have made a full examination of all the proceedings in accordance with the requirements of Anders v. California, 386 U.S. 738 (1967) and People v. Carter, 92 Ill.App. 2d 120, 235 N.E. 2d 382 (1968).

We conclude that the appeal has no legal merit and that the Public Defender should be allowed to withdraw. The judgment of conviction is affirmed.

JUDGMENT AFFIRMED.

MURPHY, J., and BURMAN, J., concur.

ABSTRACT ONLY.

52957

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
WILLIE M. CRAIG, Defendant-Appellant.	COOK COUNTY. HON. JAMES A. GEROULIS, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant, found guilty by a jury of the crime of burglary, was sentenced to a term of eight years to fifteen years in the penitentiary. On appeal he contends that he was not proved guilty beyond a reasonable doubt and that the sentence imposed is excessive.

Mr. Louis Treiman testified that he was the president of Treiman Drugs, Incorporated, a pharmaceutical business located at 3466 West 5th Avenue in Chicago. On January 27, 1967, the day of an extremely heavy snowfall he closed the store at 10:00 P.M., locking the front and rear doors and activating the alarm system. During the night the witness was notified by the alarm company that the store had been broken into.

Mr. Treiman testified that he arrived at the store about 10:00 the following morning and that the interior was in shambles, with some $15,000 worth of merchandise and equipment destroyed and/or missing. He stated that the rear door of the store, which fronted on St. Louis Avenue, had been broken into, and that a crowbar and a piece of wood larger than a two-by-four were found near that door. The witness further testified that he thought that he had seen the defendant in the store on prior occasions, but was not certain, and that he did not give the defendant permission to enter the store after hours on the night of January 27th or the morning of January 28th.

Chicago Police Officer Albert Francis testified that he and his two partners received a radio communication of a burglary in progress at the Treiman store about 1:50 A.M. on January 28, 1967. The officers had difficulty reaching the store in their police vehicle due to the heavy snowfall, and arrived at the store about 2:00 A.M., having parked their vehicle at Jackson Boulevard and St. Louis Avenue and proceeded on foot on St. Louis Avenue to the store.

When the officers arrived at the store, they observed that the rear door had been broken into. A juvenile was found standing just inside the rear doorway and was taken into custody. The officers then made a search of the inside of the premises and found defendant lying on the floor behind a counter in the front portion of the store. Defendant was told to rise, and when he failed to do so, the officers picked him up and placed him under arrest.

Officer Francis testified that while the defendant was being transported to the police station, he stated that he had "been drinking or something"; the officer testified that he detected no odor of alcohol on the defendant's breath. He further stated that no merchandise was found on defendant's person when he was searched.

Defendant maintains that the People failed to prove him guilty beyond a reasonable doubt for the reason that the evidence does not show that he entered the Treiman store with the intent to commit a theft or a felony.

The gravamen of the offense of burglary is the intent with which the building is entered. People v. Myler, 374 Ill. 72. The crime of burglary is committed upon the entry into the premises with the requisite intent, which may be proved by means of circumstantial evidence. People v. Niksic, 385 Ill. 479, 483. It is not essential to allege or to prove that anything was taken from the premises. People v. Figgers, 23 Ill. 2d 516, 519.

As stated in People v. Johnson, 28 Ill. 2d 441, at page 443:

> "Intent must ordinarily be proved circumstantially, by inferences drawn from conduct appraised in its factual environment. We are of the opinion that in the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary. Like other inferences, this one is grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose."

To the same effect see People v. Rossi, 112 Ill. App. 2d 208, wherein the court further observed, at page 212, that "The trier of fact was not required to search out a series of potential explanations compatible with innocence and elevate them to the status of a reasonable doubt."

Defendant here was found on the Treiman premises unlawfully; he was found lying on the floor behind a counter in the front portion of the store; the store and its merchandise were in shambles; and there was considerable personal property in the store which had been and which could be the subject of a theft. Under the circumstances we are of the opinion that there was sufficient evidence from which the jury could conclude that the defendant had entered the Treiman store with the intent to commit larceny.

The cases cited by the defendant in support of this position are not in point. In People v. Soznowski, 22 Ill. 2d 540, the defendant, who had been drinking heavily, entered the home of a sleeping woman without permission, and beat the woman until she awoke. The court held that the defendant's actions in this regard were not consistent with the intent to commit a theft on the premises. (See People v. Johnson, 28 Ill. 2d 441, at 442-443, wherein the court comments upon the Soznowski case.) See also People v. Glickman, 377 Ill. 360; People v. Kelley, 274 Ill. 556.

Defendant also contends, in a general manner, that the trial court committed error in giving two of the instructions to the jury, and in permitting the prosecutor to make certain comments during the closing argument. The two instructions now objected to, which were not objected to below, deal with the elements of burglary which the People had to prove before the jury could find the defendant guilty of the crime. There was no error in this regard.

The statement made by the prosecutor during closing argument, that it was the People's position that the defendant entered the Treiman store with the intent to steal something, does no more than inform the jury of the theory under which the defendant was prosecuted.

Defendant also contends that the sentence imposed was excessive. Defendant had three prior felony convictions, as well as a misdemeanor conviction, for which he served a total of twelve years. He was 41 years of age at the time of this trial. The trial judge took into consideration the fruitless efforts made in the past to rehabilitate the defendant, and further considered the time when the crime was committed and the amount of damage that was done. A reviewing court will exercise its power to reduce sentences with considerable caution and circumspection. People v. Taylor, 33 Ill. 2d 417, 424; People v. Miller, 33 Ill. 2d 439, 444-445. There is nothing in this record to indicate that the sentence imposed is either unfair or excessive.

The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.